

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1099

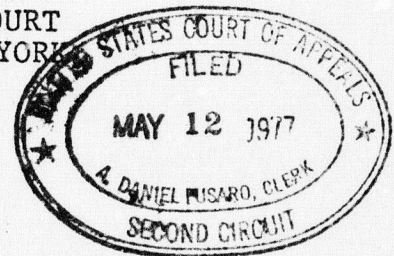
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
:
UNITED STATES OF AMERICA,
:
Plaintiff-Appellee,
:
-against-
:
PHILIP ROSATI,
:
Defendant-Appellant.
:
-----X

B
Docket No. 77-1099

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
PHILIP ROSATI
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

Table of Contents

Table of Cases	ii
Question Presented	1
Statement Pursuant to Rule 28(a)(3)	
Preliminary Statement	2
Statement of Facts	2
Argument	
Evidentiary rulings by the judge, as well as instructions on accomplice testimony denied appellant a fair trial	11
A. The accomplice credibility instruc- tion was erroneous	12
B. The admission of the passport	13
Conclusion	16

Table of Cases

<u>United States v. Mapp</u> , 476 F.2d 67 (2d Cir. 1973)	15
<u>United States v. Matlock</u> , 415 U.S. 164 (1974)	15
<u>United States v. Park</u> , 421 U.S. 616 (1975)	12
<u>United States v. Pravato</u> , 505 F.2d 703 (2d Cir. 1974)	15
<u>United States v. Swiderski</u> , 539 F.2d 854 (2d Cir. 1976)	12

Other Authorities

22 C.F.R. §51.75 (1976)	14
22 C.F.R. §51.9	13, 14
28 C.F.R. §51.80	14

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

PHILIP ROSATI,

Defendant-Appellant.

Docket No. 77-1099

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether evidentiary rulings by the judge, as well as
instructions on accomplice testimony denied appellant a fair
trial.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Edward R. Neaher) rendered on February 18, 1977, convicting appellant Philip Rosati of conspiracy to import and possess, and importation and possession of, hashish oil, in violation of 21 U.S.C. §§841(a)(1); 952(a), 960(a)(1), 960(a)(2); 18 U.S.C. §§846, 963, 2), and sentencing him pursuant to the Youth Corrections Act, 18 U.S.C. §5010(b).

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Rosati and Brad Colbert were charged in a three-count indictment* with conspiracy to import hashish oil, with importation of that substance, and with possession of the same. Prior to trial, defense counsel sought to have excluded as evidence against appellant his passport (Doc.No. 6 to Record on Appeal). The affidavit in support of the motion alleged that

*The indictment is annexed as B to the separate appendix to appellant's brief.

the passport had been given to appellant's mother after appellant had been arrested and searched, that a few days later the agents demanded the return of the passport, that she gave the passport to the agents without permission from the appellant.

In oral argument on the motion the Government's position was that appellant's mother had consented to the surrender of the passport to the agents and that since the passport was the property of the Government, the appellant could not preclude its use (Minutes of November 10, 1976 at 5-6). Judge Neaher questioned whether there was any legal claim with respect to the re-delivery of the passport because the original seizure of the passport at appellant's arrest was valid (Minutes of November 10, 1976 at 8).

Counsel argued that the validity of the mother's consent was at issue and that even if the first seizure of the passport was valid, it did not justify a later invalid seizure (Minutes of November 10, 1976 at 11). Defense counsel argued that the surrender of the papers was not voluntary but pursuant to a demand that the mother believed she could not disobey. Further, counsel argued that administrative procedures would have to be followed for the seizure of the passport (Minutes of November 10, 1976 at 16).

The defense requested a hearing (Minutes of November 10, 1976 at 42) but the judge denied the proceeding, finding that the passport had to be returned on demand to the Government and that when the passport was given to appellant's mother, there was no expectation of privacy and she could turn it over to the agents. Counsel took objection (Minutes of November 10, 1976 at 44-47).

Judge Neaher found the passport admissible because 22 C.F.R. §51.9 states that a passport remains the property of the Government. (Minutes of November 11, 1976, at 43). Counsel preserved the issue for appeal (Minutes of November 11, 1976, at 45).

The Government witnesses gave the following trial testimony:

William Meehan was a United States Customs inspector at Kennedy International Airport on April 30, 1976 (41*) when he stopped Brad Colbert (42), coming from India (49), to examine three bags (43). Meehan believed that there was an inordinate amount of weight on one side of a black suitcase Colbert was carrying. Meehan called for assistance, and Colbert was taken into another Customs area. A more thorough search of the black valise disclosed two packages of marijuana hashish (52) in a false bottom of the suitcase. Colbert was arrested (54), and a search of Colbert revealed two packages of marijuana in Colbert's socks (56). In the suitcase were also found hotel and other bills bearing the name Philip Rosati.

Drug Enforcement Administration ("DEA") agent Michael Priore also saw the hotel envelope with the name Rosati on it (354). Colbert told Priore that the suitcase did not belong to him, and Priore noticed that the clothes in the suitcase were too large for Colbert (354). Priore found an unused

*Numerals in parentheses refer to pages of the trial transcript.

American Airlines ticket for a trip to Los Angeles, California. With this information, Priore verified with American Airlines that Rosati was taking the flight to Los Angeles (368).

Priore telephoned DEA agent Peoples in Los Angeles to request that Rosati be arrested when the plane landed (369-370). A description of appellant and the clothing he was wearing was given to Peoples (372).

John Peoples and other DEA agents arrested appellant as he arrived in Los Angeles (395). Seized from the seat pocket of the seat in front of appellant was an American Airlines ticket folder (397). Also seized was a yellow pouch with a long strap and appellant's passport (398). Peoples used the three baggage stubs found in the airline ticket folder to reclaim suitcases and a rug (401). The suitcases were subsequently turned over to appellant's mother, Moselle Parcher (417). No drugs or contraband were found on appellant's body or in his bags (415).

The remainder of the Government's case was presented through Brad Meyer Colbert. Colbert was indicted as a co-conspirator in the case with appellant, although he had agreed to cooperate the night he was arrested (94). In exchange for his willingness to cooperate Colbert was immediately released on a \$10,000 personal recognizance bond (227). He was allowed to plead guilty to conspiracy, with the two substantive counts dismissed (90, 95). Further, the Assistant United States

Attorney agreed to reveal the cooperation to the judge who would impose sentence on Colbert (314-315), and sentencing was delayed until after appellant's trial (317).

Colbert had a record of drunken driving, possession of alcohol in a moving vehicle, lewd conduct and cursing an officer (92), and possession of marijuana (259). Colbert began smoking marijuana in the seventh grade (97), and used cocaine, benzedrine, LSD, mescaline, alcohol, and heroin, to which he was addicted (88, 242). He obtained money to buy his own drugs by selling hashish oil and marijuana (89). Because of his drug use, he was sent to a special high school (243). Further, he had been admitted to a psychiatric hospital in June 1975 (255). Additional psychiatric counseling was recommended when Colbert was released from the hospital, but he took very little of it (256-257).

Colbert testified that he had met appellant a year and a half previously (96). According to Colbert, in about September 1975, appellant came to Colbert's home to sell hashish oil and rugs (98). Subsequent meetings also took place (99). Colbert asserted that appellant said he had just returned from India and Pakistan, where hashish oil is obtained (104). Appellant asked if Colbert wanted to take a trip with him, and Colbert refused (104). Appellant moved in with Colbert during November or December 1975 (105-106). While there appellant and his girlfriend brought some hashish, which appellant claimed had come in a lamp from India (107).

Colbert and appellant spoke about Colbert either investing in a trip to India, or going to India. According to Colbert, appellant suggested that Mrs. Colbert or another woman would be a good "carrier" (109, 132-133), and told Colbert that if he carried a false-bottomed suitcase back to the United States from India, he would get \$5,000 (110). Appellant showed Colbert his passport and photographs of Pakistan and India (111, 117).

The Government then introduced into evidence photographs (Exhibit #15 (125)) of a prior trip by appellant to Pakistan and Kashmir. These photographs included people in no way associated with the crimes charged (120) but Colbert explained that plans for the trip were discussed and appellant pointed out hashish trees (127).*

Colbert who was short of funds decided he would go on the trip (133). Appellant and Colbert planned to go to Deli, Persh-
awar, and Bombay and to buy hashish oil in Pershawar (134).

In November 1975 Colbert began a series of immunizations, and in December he obtained a passport and visas (101) with appellant's help (138). Appellant gave Colbert \$1,000 to buy the airline tickets (139), and the two bought and packed supplies to fix and prepare the suitcase (143-145).

On April 10, 1976, they began the trip to New York and

*Peoples was also asked to identify green plants in photographs of appellant, and Peoples said they were marijuana plants (413).

The Government withdrew from evidence those photographs not referred to by Colbert as being used in the discussion (134).

then to Delhi (149-150). The baggage did not arrive at Delhi with appellant and Colbert (150), but came the following day (152).

The two went on to Pashawar (153), and appellant, in Colbert's presence, bought hashish oil for \$1,000 (154-155) from a man named John. Later, John delivered the hashish to appellant in a park in another Indian City, some four hours' drive away.

Appellant and Colbert put the hashish oil in the suitcase, which they then resealed (177-178). They tore the names off the suitcase and returned to the United States via Bombay and Delhi.

On direct examination, Colbert testified that he and appellant intended to have no contact on the plane, but on cross-examination testified to the contrary. He and appellant sat separately merely so they might have aisle seats and had substantial contact on the plane (294).

In his testimony on cross-examination, Colbert revealed that in his post arrest statements to the agents he had not told them that appellant had come to his home to sell hashish oil (231). Nor did Colbert tell the agents in those statements that appellant had said that on prior occasions, he used female carriers (231).

The defense presented no evidence. At the conclusion of the case, the defense requested a charge on accomplice testimony, which read:

Testimony of an accomplice needs to be very carefully scrutinized by a jury. In the first place, the fact that the witness committed a felony shows a defect in his character that may have made him more liable to lie on the witness stand. In the second place, he can be punished for his own offense so that he may be amenable to suggestions by the government as he tries to court the prosecutor's favor and avoid some degree of punishment himself.

You should be very hesitant to convict a defendant if an accomplice's testimony is unsupported or uncorroborated as it bears upon the guilt of a particular defendant.

If you believe that any witness was induced to testify in this case by any promise, or that any hope was held out that he would be rewarded, or in any way benefit if he implicated the defendant in the crime charged herein, then you may consider that fact in determining what weight should be given to the testimony, scrutinize it closely, and unless you can reconcile it with truth, completely reject it.

The judge rejected the request in favor of his own standard charge (425). The judge charged as follows:

An accomplice is one who wilfully associates himself with the commission of a crime. The law does not prohibit the use of accomplice testimony and whether you approve or disapprove of its use should not enter into your consideration of the case. In certain types of cases the Government is, of necessity, frequently compelled to rely upon the testimony of an accomplice. Otherwise it would be difficult to detect or prosecute some wrongdoers and that is particularly true with conspiracy cases.

Often the Government has no choice in the matter. It must take witnesses to

transactions as they are. There is no requirement in the Federal Court that the testimony of an accomplice be corroborated. A conviction may rest on the uncorroborated testimony of such a witness, if he is found credible and reliable. However, the testimony of such a witness should be viewed with great caution and scrutinized very carefully. Nevertheless, it does not follow, because a person has acted or been a participant in a crime or is an accomplice that he is not capable of giving a truthful version of what occurred. You should ask yourselves these questions:

Did Colbert give false testimony or color his testimony contrary to fact because he has not been prosecuted on the remaining charges in the indictment or because he believes that his cooperation may result in more lenient treatment. If you find his testimony was deliberately untruthful, you should unhesitatingly reject it. On the other hand, if upon a cautious and careful examination you are satisfied that he has given a truthful version of the essential events, beyond a reasonable doubt, there is no reason why you should not accept it.*

After the charge was completed, the defense objected to the instruction on accomplice testimony specifically mentioning the fact that only one sentence of the long charge cautioned the jurors about accomplice testimony. The judge believed his charge to be neutral and gave no further instruction (536-538).

After deliberating the jury found appellant guilty of all three counts charged.

*The charge is annexed as "C".

ARGUMENT

EVIDENTIARY RULINGS BY THE JUDGE,
AS WELL AS INSTRUCTIONS ON ACCOM-
PLICE TESTIMONY DENIED APPELLANT
A FAIR TRIAL.

In this case, the Government had to rely on the testimony of Brad Colbert to prove appellant's connection with the crime. Appellant was not found in possession of any drugs, he gave no damaging or incriminating statements, the Government called no other witnesses to the events and had no documentary evidence against appellant that could tie him to the conspiracy or importation. Colbert, however, was a very weak witness. He was a long-time drug user and had been a heroin addict. He had sold marijuana and hashish oil prior to his meeting appellant. He was given a substantial benefit for his cooperation both because the two substantive counts were dismissed and because, even as to sentencing on the remaining count, the Government agreed to give the district judge information about the cooperation. Since Colbert was the one found with the drugs, both in his luggage and on his body, he had no choice but to try to shift the responsibility to someone else in order to save himself. In these circumstances, evidentiary rulings affecting the corroboration of Colbert's testimony and instructions with respect to evaluating credibility became critical to the outcome of the case.

A. The accomplice credibility instruction was erroneous.

In his instruction to the jurors on how they were to view the testimony of Colbert, the accomplice and co-defendant, the district judge included the required cautionary instruction -- that the testimony of an accomplice be scrutinized with care United States v. Swiderski, 539 F.2d 854, 860 (2d Cir. 1976), and cases cited therein. However, the remainder of the instruction on accomplice testimony was heavily weighted for the Government and the impact of the total charge (United States v. Park, 421 U.S. 616 (1975)) was to undermine the purpose of the required warning. Accordingly, the district judge was in error when he concluded that his charge was impartial and overruled the defense counsel's proper objection to the charge.

A substantial portion of the judge's charge was taken with explaining why the Government was frequently forced to use the testimony of an accomplice. He told the jurors that often the Government could not prosecute if they did not use the testimony of such witnesses, and that such witnesses were capable of giving a truthful version of the events.

In contrast, the judge's explanation of why an accomplice's testimony could be disbelieved was equivocal. He never told the jurors that scrutiny was necessary because people may not tell the truth, or the complete truth, either intentionally or otherwise, when they have been given promises by the Government; that concern for themselves and their future may overcome the

duty to tell the truth regardless of the intention of the witness to lie. Instead of stating these propositions as affirmative possibilities which might cause rejection of Colbert's testimony, Judge Neaher merely posed questions to the jurors and told the jurors to reject Colbert's testimony if they found it to be deliberately untruthful.

The strength of one part of the charge as contrasted with the weakness of the other, was recognized by defense counsel in his objection after it was given. Indeed, prior to the charge, counsel requested that the jury be told to consider the impact of a promise on credibility and the judge chose instead to give his own instruction.

B. The admission of the passport.

Prior to trial counsel sought a ruling which would have prevented the admission into evidence of appellant's passport showing several trips to India. Suppression was sought on the ground that the passport had been illegally seized. The motion was denied when the judge concluded that the Government, pursuant to 22 C.F.R. §51.9, had the right to have any passport returned to it on demand. However, the issue before the court was not whether the Government was entitled to the passport on demand, but how the passport was obtained in this case. To the extent that the facts were developed on the record by counsel's oral presentation, when the judge denied a hearing, appellant

had a protected privacy interest in the passport. Thus, it was critical to determine whether the passport was seized in accord with constitutional standards, here a valid consent.

As the district judge noted, 22 C.F.R. §51.9 states that a passport is the property of the United States and must be returned on demand. However, the judge failed to consider the remainder of the regulations applicable to passports. The holder of a passport must be notified in writing of adverse action with respect to his right to use the passport. Such a notice must set forth the reasons for the adverse action and the procedures for review (22 C.F.R. §51.75 (1976)). Further, specific administrative appeal procedures, outlined in 28 C.F.R. §§51.81-51.105, apply to any action taken by the Secretary of State which in any way adversely affects the ability of a person to use the passport (28 C.F.R. §51.80).

In the record in this case, there is no evidence that any demand, to say nothing of whether it was in writing, was made to appellant for the return of the passport. All that is known is that the agents examined appellant's passport in Los Angeles and that they then returned it to him and requested, indeed virtually compelled him, to give the passport, as well as other belongings, to his mother so the agents would not have to keep them (409-410). Thus the passport was rightfully and legally in the actual or constructive possession of appellant. Without the prescribed demand having been made to appellant for the surrender of the passport, appellant had a protected interest in that document. Furthermore, it was controverted whether the passport was

seized after a valid consent given by appellant's mother. She did not have a common interest with appellant in the document and had it in her possession only because the agents compelled her to take it, along with appellant's other possessions. She had no authority to comply with the agent's demand to return the passport. United States v. Matlock, 415 U.S. 164, 171 (1974); See United States v. Pravato, 505 F.2d 703, 704 (2d Cir. 1974). It is clear that even documents that a person has no legal right to possess, such as contraband, must be suppressed if illegally seized. United States v. Mapp, 476 F.2d 67 (2d Cir. 1973).

The admission of the passport was prejudicial for it provided documentary corroboration of Colbert's testimony thereby making it seem more credible. Accordingly, it was reversible error to deny a suppression hearing and full exploration of the facts as to how the Government got the passport.

Conclusion

For the above-stated reasons the judgment below should be reviewed and a new trial granted.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Appellant
PHILIP ROSATI
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel.